Office - Supreme Court, U.S.
FILED
DEC 13 1983
ALEXANDER L. STEVAS,
CLERK

Case No. 83-834

IN THE

Supreme Court of the United States

October Term, 1983

EDWARD SACK,

Petitioner,

v.

KIMBERLY-CLARK CORPORATION,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

PATRICK W. SCHMIDT
Counsel of Record

GEORGE K. WHYTE, JR.
DAVID B. KERN
Attorneys for Respondent
Kimberly-Clark Corporation

Quarles & Brady
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000

Of Counsel:

EDWARD E. WALL
Personnel Relations Attorney
Kimberly-Clark Corporation
Neenah, Wisconsin 54956
(414) 721-2600

QUESTIONS PRESENTED FOR REVIEW

1. Does the decision of the Court of Appeals for the Seventh Circuit conflict with decisions of this Court or other federal appellate courts with respect to its holding that, as one element in a claim of age discrimination, a plaintiff must establish that he was "qualified" for the position from which he was discharged by showing that he was performing at a level that met his employer's legitimate expectations?

2. Did the Court of Appeals for the Seventh Circuit properly conclude that there existed no genuine issue of material fact regarding Kimberly-Clark Corporation's motivation for discharging Edward Sack?

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
RULE 28.1 LISTING	iv
STATEMENT OF THE CASE	1
ARGUMENT	4
I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR DECISIONS OF OTHER FEDERAL COURTS OF APPEALS, AND THE PETITION FOR WRIT OF CERTIORARI SHOULD THEREFORE BE DENIED.....	4
II. THERE EXISTS NO GENUINE ISSUE REGARDING KIMBERLY-CLARK'S MOTIVE FOR DISCHARGING EDWARD SACK	12
CONCLUSION	17

TABLE OF AUTHORITIES

United States Supreme Court Decisions

	Page(s)
McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).....	2, 6, 8, 16, 18

United States Court of Appeals Decisions

Hahn v. Sargent, 523 F. 2d 461 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976).....	13
Halsell v. Kimberly-Clark Corporation, 683 F.2d 285 (8th Cir. 1982), cert. denied, ___ U.S. ___, 103 S.Ct. 1194 (1983).....	10
Kephart v. Institute of Gas Technology, 630 F. 2d 1217 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981).....	7, 10
Laugesen v. Anaconda Co., 510 F.2d 307 (6th Cir. 1975)..	16
Locke v. Commercial Union Insurance Co., Div. of Commercial Union Assurance Companies, Ltd., 676 F.2d 205 (6th Cir. 1982).....	11

	Page(s)
Loeb v. Textron, Inc. 600 F.2d 1003 (1st Cir. 1979).....	8-9, 10, 11
Lovelace v. Sherwin-Williams Co., 681 F.2d 230 (4th Cir. 1982).....	10-11

Other Authorities

Rule 56, Federal Rules of Civil Procedure	13

RULE 28.1 LISTING

Pursuant to Supreme Court Rule 28.1, respondent submits the following list of all parent companies, subsidiaries (except wholly owned subsidiaries) and affiliates of respondent. In accordance with the instructions of the Clerk, only publicly-traded corporations are listed. The corporations listed below may not be "affiliates" or "publicly held," as those terms are used by the Securities and Exchange Commission:

Kimberly-Clark de Mexico, S.A. de C.V.

Carlton Paper Corporation Ltd.

STATEMENT OF THE CASE

Petitioner, Edward Sack, commenced this action against Respondent, Kimberly-Clark Corporation, on June 22, 1981, alleging that his termination from his position as an employee benefits attorney, less than one year after his hiring, was because of his age (then 48) in violation of the Age Discrimination in Employment Act of 1967, as amended ("ADEA"), 29 U.S.C. §621 et seq. Following the completion of discovery, Kimberly-Clark moved for summary judgment, which motion was granted on November 23, 1982. Sack v. Kimberly-Clark Corporation, No. 81-C-728 (E.D. Wis., Nov. 23, 1983) (App. B). On appeal, the Court of Appeals for the

Seventh Circuit affirmed. Sack v. Kimberly-Clark Corporation, No. 82-3088 (7th Cir. July 28, 1983) (per curiam) (App. A). Both the District Court and the Seventh Circuit found that Sack had failed to establish a prima facie case of age discrimination under this Court's analysis in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). The District Court found that Sack had failed to establish that he was "qualified" for the position from which he was discharged in the sense that he was performing at the legitimate standards set by his employer. The District Court reviewed extensive deposition testimony from Sack's super-

visors, Mr. Barry Bloch,[1] who originally hired Sack and eventually made the decision to discharge him, and Mr. Douglas Tormey, regarding their dissatisfaction with Sack's work, noted Sack's admission that there were errors in his work and that he had received criticism regarding his work and his writing style, and found that Sack had failed to establish that he was performing at the legitimate standards set by his employer and that Sack had therefore failed to establish a prima facie case of age discrimination. Alternatively, the District Court held that, even if Sack had established a prima facie case of age discrimination,

---

[1]Both the District Court and the Court of Appeals incorrectly spelled Mr. Bloch's name "Block."

Kimberly-Clark had articulated a legitimate, non-discriminatory reason (Sack's poor work performance) for discharging Sack. The Seventh Circuit affirmed the District Court's holding in its entirety.

ARGUMENT

I. THE SEVENTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT OR DECISIONS OF OTHER FEDERAL COURTS OF APPEALS, AND THE PETITION FOR WRIT OF CERTIORARI SHOULD THEREFORE BE DENIED.

Review on writ of certiorari is not a matter of right. It will be granted only when there are special and important reasons. Among the reasons considered are:

> (a) When a federal court of appeals has rendered a decision in conflict with the decision

> of another federal court of appeals on the same matter ...
>
> * * *
>
> (b) When a ... federal court of appeals ... has decided a federal question in a way in conflict with applicable decisions of this Court.

Sup.Ct.R. 17.1. Although Edward Sack, the petitioner, has not discussed the application of these standards in his petition, it appears that he is arguing that the decision of the Seventh Circuit in Sack v. Kimberly-Clark Corp., No. 82-3088 (7th Cir. July 28, 1983) (per curiam) (App. A) conflicts with the reasoning applied by other federal appellate courts and this Court in analyzing the elements of a cause of action under the Age Discrimination in Employment Act.

Because the reasoning used by the Seventh Circuit is not inconsistent with other decisions, the petition should be denied.

Sack asserts that the Seventh Circuit's analysis will preclude any plaintiff from establishing a prima facie case of age discrimination (Petition at 7). This assertion is premised on the District Court's conclusion, affirmed by the Court of Appeals, that Sack had failed to establish a necessary element of a prima facie case of employment discrimination, the "qualified for the position" element, as explained in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). However, those courts' determinations that Sack was not "qualified" were based on Kimberly-Clark's unrebutted evidence

that Sack was not performing up to its legitimate standards. Sack takes issue with this method of analysis, noting that the Seventh Circuit followed its previous decision in Kephart v. Institute of Gas Technology, 630 F.2d 1217 (7th Cir. 1980), in determining that he had not made out a prima facie case of age discrimination (Petition at 10-11). This argument provides no legitimate basis for the granting of Sack's petition.

First, if Sack is attacking the method of analysis employed in Kephart, that attack is inappropriate. Throughout Sack's petition, he repeatedly fails to note that this Court denied certiorari in that case. See 450 U.S. 959 (1981). Kephart is not now before this Court for review.

More importantly, Sack is wrong in contending that the Seventh Circuit departed from established methods of analysis under the ADEA in determining that he had not made out a prima facie case of age discrimination. Sack's bold assertion that "[n]owhere in the earlier case law is there any provision for finding no prima facie case because of an employer's asserted reasons for the discharge" (Petition at 12) is erroneous.

In Loeb v. Textron, Inc., 600 F.2d 1003 (1st Cir. 1979), which is one of the earlier circuit court decisions to apply the McDonnell Douglas criteria to cases under the ADEA, the First Circuit noted that, in order to make out a prima facie case of age discrimination in a discharge

case, a plaintiff must show that he was "qualified" in the sense that "he was doing his job well enough to rule out the possibility that he was fired for inadequate job performance, absolute or relative." 600 F.2d at 1013. The proper standard to be applied in determining whether a plaintiff establishes a prima facie case on qualification is whether "he was performing his job at a level that met his employer's legitimate expectations" 600 F.2d at 1014 (emphasis added). Thus, contrary to Sack's argument, "the employer's asserted reason for the discharge" can and should play an important role in determining whether a prima facie case of age discrimination has been established.

The Seventh Circuit, in both Kephart and Sack, employed precisely the same analysis used in Loeb. The Court in both cases determined that the plaintiffs were not performing their jobs at a level that met their employers' legitimate expectations, and appropriately concluded that the plaintiffs therefore had not established prima facie cases of age discrimination.

The method of analysis first enunciated by the First Circuit in Loeb has been repeatedly recognized and applied by other federal appellate courts as well. See, e.g., Halsell v. Kimberly-Clark Corp., 683 F.2d 285, 290-91 (8th Cir. 1982), cert. denied, __ U.S. __, 103 S.Ct. 1194 (1983); Lovelace v.

Sherwin-Williams Co., 681 F.2d 230, 244 (4th Cir. 1982); and Locke v. Commercial Union Insurance Co., Div. of Commercial Union Assurance Companies, Ltd., 676 F.2d 205 (6th Cir. 1982). Thus, Sack is wrong in suggesting that the Seventh Circuit's method of analysis is somehow novel or represents a departure from established ADEA standards. Since the unrebutted evidence showed that Sack "was fired for inadequate job performance," Loeb, supra, 600 F.2d at 1013, Sack failed to establish that he was "qualified" so as to make out a prima facie case of age discrimination.

II. THERE EXISTS NO GENUINE ISSUE REGARDING KIMBERLY-CLARK'S MOTIVE FOR DISCHARGING EDWARD SACK.

In actuality, Sack is merely attacking the sufficiency of Kimberly-Clark's evidence that he was not living up to his superiors' expectations and that this was the reason for his discharge. This attack only highlights the total lack of any evidence rebutting his superiors' judgments and, more importantly, the absence of the necessary link or nexus between his termination and his age.

Sack asserts that no individual will be able to establish that he or she is "qualified" in a discharge case since all employers will assert (subjectively) that unsatisfactory performance prompted the discharge and employers will thereby

always be able to defeat a prima facie case of discrimination (Petition at 15-19). What this argument ignores is that unrebutted evidence, even if subjective, can and must be sufficient to support the granting of a summary judgment motion. Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir. 1975), cert. denied, 425 U.S. 904 (1976). This is why Rule 56 exists. In order to avoid the operation of the Rule, the opposing party must present competent evidence that a genuine issue of material fact is present. When Kimberly-Clark (1) alleged that Sack was not performing his job satisfactorily and that this, and not his age, was the reason for his discharge, and (2) presented evidence in support of these

allegations in the form of affidavits, exhibits and deposition testimony, it was incumbent on Sack to respond so as to avoid summary judgment. Sack had to present competent evidence that he was performing satisfactorily and that his supervisors' judgments were not only wrong, but were a pretext for age discrimination. He did not do this and the Circuit Court correctly affirmed the District Court by relying upon the "unrebutted deposition testimony" and plaintiff's failure to "show that age was a determining factor in his discharge" (App. A (4) - (6)). All Sack submitted was his own unsupported and self-serving testimony that he was performing satis-

factorily and that he was discharged because of his age.[2]

While it is true that the issue of qualification is ordinarily one for the factfinder (Petition at 18-19), that is only so if there exist genuine issues of material fact to be "found." No such genuine issues existed here. Sack's argument, carried to its

---

[2]Not only is Sack's self-serving testimony unsupported by any record evidence, but he has seriously mischaracterized the evidence that is of record. Sack asserts that no criticism of his work was presented while he was employed at Kimberly-Clark and that complaints arose only after he was terminated (Petition at 11, 15). However, both the Seventh Circuit and the District Court found otherwise, based on Sack's own testimony. See App. A (2)(3), B(10); "Sack himself acknowledges that Block [sic] told him that he did not like his writing style and that his work was sloppy and careless." This Court should not be misled.

logical extreme, is that every discharged employee who claims or suspects discrimination is entitled to a trial on the merits even though full discovery revealed no evidence to support the suspicion. This is absurd.

Whether one employs the method of analysis enunciated in McDonnell Douglas, or whether one simply and directly analyzes whether the plaintiff has presented sufficient evidence to establish a link between his termination and his age, see Laugesen v. Anaconda Co., 510 F.2d 307, 317 (6th Cir. 1975), Sack's evidence was insufficient. His wishful assertion that "he showed that 'his performance was of sufficient quality to merit continued employment, thereby raising an inference

that some other factor was involved in the decision to discharge him'" (Petition at 13) is precisely what he failed to show. Since the evidence of record undisputedly established that Sack was terminated for poor work performance and for no other reason, the petition for writ of certiorari should be denied.

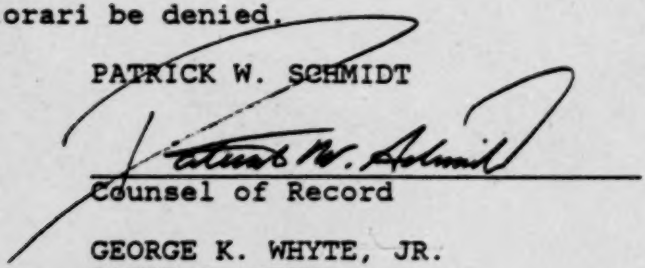
CONCLUSION

Edward Sack has failed to establish that there are "special and important reasons" to justify a granting of his petition for writ of certiorari. The decision of the Court of Appeals for the Seventh Circuit (1) is consistent with the established analysis of the requirements for a prima facie case under the

ADEA, (2) did not unreasonably extend this Court's McDonnell Douglas decision, (3) conforms with the standards applicable to Rule 56 summary judgment motions, and (4) is supported by the evidence of record. Therefore, Kimberly-Clark Corporation, respectfully

requests that the petition for writ of certiorari be denied.

PATRICK W. SCHMIDT



Counsel of Record

GEORGE K. WHYTE, JR.
DAVID B. KERN
Attorneys for Respondent
Kimberly-Clark Corporation

Quarles & Brady
780 North Water Street
Milwaukee, Wisconsin 53202
(414) 277-5000

Of Counsel:

EDWARD E. WALL
Personnel Relations Attorney
Kimberly-Clark Corporation
Neenah, Wisconsin 53202
(414) 721-2600